

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**LAMBDA LEGAL DEFENSE & EDUCATION
FUND,**

120 Wall Street, Suite 1500
New York, NY 10005,

Plaintiff,

v.

**SUBSTANCE ABUSE AND MENTAL
HEALTH SERVICES ADMINISTRATION**

1 Choke Cherry Road
Rockville, MD 20857,

and,

**U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,**

200 Independence Avenue, S.W.
Washington, DC 20201

Defendants.

CASE NUMBER 1:07CV00458

JUDGE: John D. Bates

DECK TYPE: General Civil

DATE STAMP: 03/09/2007

COMPLAINT

Lambda Legal Defense & Education Fund ("Lambda Legal") brings this Complaint under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 *et. seq.*; 45 C.F.R. Part 5, to compel the Substance Abuse and Mental Health Services Administration ("SAMHSA") and Department of Health and Human Services ("DHHS") to (1) produce agency records requested pursuant to FOIA that are being improperly withheld from Lambda Legal and (2) waive fees resulting from Lambda Legal's FOIA request pursuant to the public interest fee waiver, 5 U.S.C.

§ 552(a)(4)(A)(iii); 45 C.F.R. § 5.45, or the educational institution and public media fee waiver, 5 U.S.C. § 552(a)(4)(A)(ii)(II); 45 C.F.R. § 5.41.

In support of its Complaint, Lambda Legal, through its *counsel pro bono publico*, states the following:

JURISDICTION

1. This Court has jurisdiction over both the defendants and this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), 701 *et seq.*; 28 U.S.C. § 1331, and 45 C.F.R. § 5.35(a).

VENUE

2. Venue is proper under 5 U.S.C. §§ 552(a)(4)(B), 703, and 28 U.S.C. § 1391.

PARTIES

Plaintiff Lambda Legal

3. Plaintiff Lambda Legal is a non-profit organization that provides information related to the civil rights of lesbian, gay, bisexual, and/or transgender (“LGBT”) people and those with HIV to a wide cross-section of the public. Lambda Legal is also a legal advocacy organization dedicated to protecting and promoting the health, welfare, and civil rights of LGBT people and those with HIV. Lambda Legal maintains its headquarters in New York, New York.

4. As part of its mission, Lambda Legal regularly gathers information and disseminates important news through an Internet web site at www.lambdalegal.org, press releases, and publications that include fact sheets, background information sheets, booklets, “know-your-rights” tool kits, brochures, and email news bulletins.

5. Lambda Legal's printed publications reach individuals throughout the United States and internationally, its website receives approximately 76,000 visits per month, and there are 22,000 subscribers to Lambda Legal's email alerts.

Defendant Government Agencies

6. Defendant SAMHSA is an agency within the meaning of 5 U.S.C. § 552(f). SAMHSA is an "operating division" of DHHS. SAMHSA is in possession or control of the records requested by Lambda Legal.

7. Defendant DHHS is an agency within the meaning of 5 U.S.C. § 552(f). DHHS freedom of information officers, pursuant to 45 C.F.R. § 5.31(a)(2), make the determination of whether to release or deny records requested from SAMHSA. DHHS is in possession or control of the records requested by Lambda Legal.

COUNT I – FOIA REQUEST

8. Lambda Legal incorporates by reference all preceding allegations in this Complaint.

9. On July 24, 2006, Lambda Legal requested records from SAMHSA under FOIA that were related to the removal, on or around January 21, 2006, of the SAMHSA website or webpage(s) containing information related to mental health and substance abuse issues faced by LGBT people. *See* Ex. A, Lambda Legal's FOIA Request. The website or webpage(s) also contained links to medical resources and support groups. Ex. A at Ex. 1. The website or webpage(s) reportedly included categories of topics titled "Homophobia & Heterosexism," "Social Support & Violence Prevention," and "Youth and Suicide," among others. Ex. A at Ex. 1, Ex. 8. The website or webpage(s) contained LGBT-specific research and data similar to those maintained by SAMHSA for other specific, demographic groups, such as Native Americans, Hispanics, and others. Ex. A at Ex. 1.

10. SAMHSA removed the website or webpage(s) following a letter-writing and lobbying campaign organized by The Family Research Council ("FRC") that started on or around January 11, 2006. *See* Ex. A at Exs. 1-3. Indeed, a January 27, 2006 letter to HHS Secretary Mike Leavitt from FRC President Tony Perkins claims that the website was removed immediately after FRC's lobbying effort. *See* Ex. A at Ex. 1.

11. In support of its FOIA request, Lambda Legal submitted a specific list of records that it was seeking from SAMHSA and DHHS. *See* Ex. A at 3-4. Lambda Legal requested that the documents be produced as they became available rather than waiting to deliver all records at the end of SAMHSA's search. *Id.* at 4.

12. By letter dated July 31, 2006, SAMHSA acknowledged receipt of Lambda Legal's FOIA request, stating, "We have asked the appropriate action office(s) to send the requested records for us to review." *See* Ex. B. The SAMHSA letter also stated, "You may contact this office 20 working days from the date of this letter to find out the status of your request." *Id.*

13. On the twentieth working day after SAMHSA received Lambda Legal's FOIA request, *i.e.*, August 28, 2006, Lambda Legal, through counsel, telephoned SAMHSA and left a message inquiring about the status of Lambda Legal's request. *See* Ex. C. The next day, on August 29, 2006, another telephone message was left inquiring about the status of Lambda Legal's request. *Id.* Lambda Legal has received no response from SAMHSA.

14. On August 30, 2006, Lambda Legal's counsel wrote SAMHSA about the status of Lambda Legal's request. *See* Ex. C. Again, Lambda Legal has received no response from SAMHSA.

15. Lambda Legal has received no further communication or correspondence from SAMHSA since its letter dated July 31, 2006.

16. Despite having had the previous six months to do so, SAMHSA and DHHS have not identified any unusual or exceptional circumstances justifying their total silence and failure to respond to Lambda Legal's FOIA request.

17. SAMHSA and DHHS have failed to comply with the requisite time periods provided in 5 U.S.C. § 552(a)(6)(A) and 45 C.F.R. § 5.35, which govern compliance under FOIA with respect to the release of the records requested by Lambda Legal.

18. SAMHSA's and DHHS's failure to produce the documents amounts to unlawful withholding of agency records and unreasonable delay.

19. Lambda Legal has a legal right under FOIA to obtain the information it seeks, and SAMHSA and DHHS have no legal basis to withhold the requested documents.

20. Given SAMHSA's and DHHS's failure to comply with the time periods that govern compliance under FOIA, Lambda Legal "may proceed as if [DHHS] had denied [Lambda Legal's] request or [Lambda Legal's] appeal" pursuant to 45 C.F.R. § 5.35(a). This Complaint, therefore, is ripe for consideration by this Court.

COUNT II – DETERMINATION OF PUBLIC INTEREST FEE WAIVER

21. Lambda Legal incorporates by reference all preceding allegations in this Complaint.

22. SAMHSA and DHHS have not responded to Lambda Legal's request for a public interest fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.45.

23. Given SAMHSA's and DHHS's failure to comply with the statutory time periods that govern fee waiver requests, Lambda Legal has exhausted its administrative remedies with respect to its public interest fee waiver request.

24. Lambda Legal's public interest fee waiver request, *see* Ex. A at 5-6, amply demonstrated that disclosure of the requested documents would be in the public interest because

disclosure will help the public understand the degree to which SAMHSA is fulfilling, and intends to fulfill its mission in preventing substance abuse and promoting mental health for all citizens of the United States, including persons with a minority sexual orientation, such as LGBT persons, or those with HIV.

25. Significant public interest in the manner in which SAMHSA's website or webpage(s) were taken offline or shut down as a result of lobbying by FRC is demonstrated by the numerous news articles published on the topic. *See* Ex. A at 5 (detailing the published news articles).

26. The removal of the website has been the subject of a Congressional inquiry. In a March 9, 2006 letter, Congresswoman Tammy Baldwin (D-WI) and fifty-nine other Members of Congress sought an explanation from DHHS Secretary Leavitt "regarding the rationale behind DHHS's decision to take down the website." *See* Ex. A at Ex. 8 (news article with letter from Congress).

27. As set forth in Lambda Legal's public interest fee waiver request, Ex. A at 5-6, Lambda Legal's records request is not in the commercial interest of Lambda Legal or any of its members. Lambda Legal is a non-profit organization that provides information related to the civil rights of LGBT people and those with HIV to a wide cross-section of the public. Lambda Legal is also dedicated to protecting and promoting the health, welfare, and civil rights of LGBT people and those with HIV. The records obtained as a result of Lambda Legal's FOIA request will be used to educate the public on how government decisions related to these issues are made and finalized. Lambda Legal will not sell or otherwise profit from the information obtained as a result of this request.

**COUNT III – DETERMINATION OF EDUCATIONAL INSTITUTION & NEWS
MEDIA FEE WAIVER**

28. Lambda Legal incorporates by reference all preceding allegations in this Complaint.

29. SAMHSA and DHHS have not responded to Lambda Legal's request for a fee waiver based on the educational institution and public media fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 45 C.F.R. § 5.41.

30. Given SAMHSA's and DHHS's failure to comply with the statutory time periods that govern fee waiver requests, Lambda Legal has exhausted its administrative remedies with respect to its educational institution and public media fee waiver request.

31. Lambda Legal's educational institution and public media fee waiver request, *see* Ex. A at 6-7, amply demonstrated that Lambda Legal is a qualified educational and news media entity.

32. Lambda Legal is a non-profit organization that seeks to educate and distribute news and information related to the health, welfare, and civil rights of LGBT people and those with HIV to a wide cross-section of the public. Lambda Legal also is a legal advocacy organization dedicated to protecting and promoting the health, welfare and civil rights of LGBT people and those with HIV.

33. As part of its mission, Lambda Legal regularly gathers information and disseminates important news through an Internet web site at www.lambdalegal.org, press releases, and publications that include fact sheets, background information sheets, booklets, "know-your-rights" tool kits, brochures, and email news bulletins.

34. Currently, Lambda Legal's printed publications reach people throughout the United States and internationally. Lambda Legal's website receives approximately 76,000 visits per month. The Internet is a highly accessible source of current information, and Lambda Legal's

web site provides significant opportunities for Lambda Legal to disseminate breaking news regarding the civil rights of LGBT people and those with HIV, including various FOIA-related information of interest to the general public. In addition, Lambda Legal has approximately 22,000 subscribers to its e-mail alerts. These alerts typically present current events that impact and relate to LGBT welfare and civil rights. The email alerts also present events and issues that require immediate attention. Finally, Lambda Legal produces brochures and fact sheets that are based on information obtained through FOIA and other sources. These materials are regularly disseminated to Lambda Legal's members, reporters for major news outlets, and the general public.

PRAYER FOR RELIEF

WHEREFORE, Lambda Legal Defense & Education Fund prays that this Court:

- A) Orders SAMHSA and DHHS to disclose the records requested in Lambda Legal's FOIA request in their entireties and make copies promptly available;
- B) Orders SAMHSA and DHHS to grant Lambda Legal the requested public interest fee waiver;
- C) Orders SAMHSA and DHHS to grant Lambda Legal the requested educational institution and news media fee waiver;
- D) Awards reasonable costs and attorney's fees as provided in 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412(d);
- E) Expedites this action in every way pursuant to 28 U.S.C. § 1657(a); and,

F) Grants such other relief as the Court may deem just and proper.

Respectfully submitted,

LAMBDA LEGAL DEFENSE & EDUCATION FUND

By Counsel:

A handwritten signature in black ink, appearing to read 'Donald R. McMinn', is written over a horizontal line.

Donald R. McMinn (D.D.C. Bar No. 462894)

Vivek K. Hatti (D.D.C. Bar No. 476002)

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